SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 146.

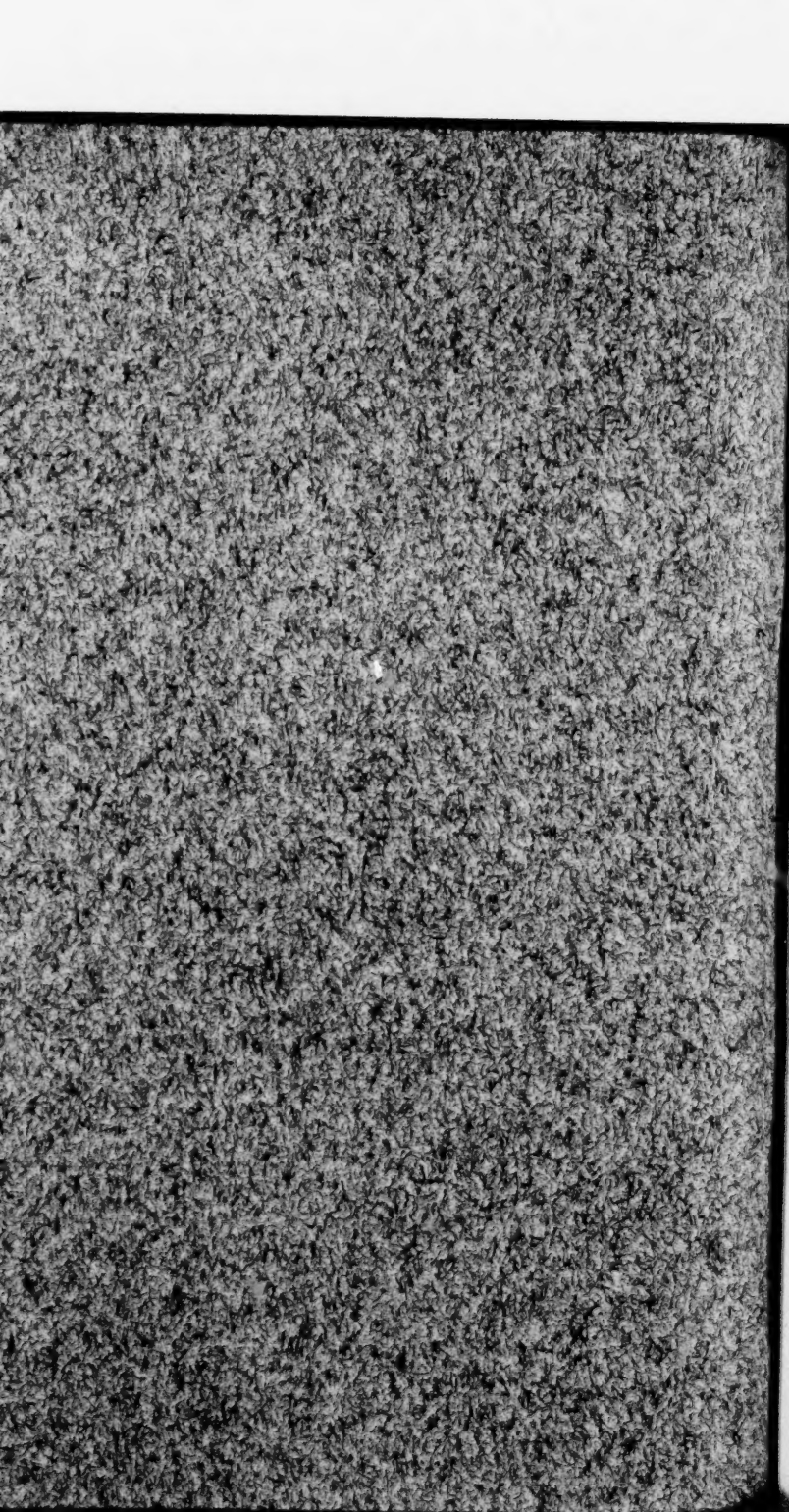
SWISS OIL CORPORATION, Plaintiff in Error,

vs.

WILLIAM H. SHANKS, Auditor of Public Accounts of the State of Kentucky.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

A. O. STANLEY,
E. L. McDONALD,
Counsel for Plaintiff in Error.



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(31,279.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 148.

SWISS OIL CORPORATION, PLAINTIFF IN ERROR,

vs.

WILLIAM H. SHANKS, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

I.

It is the contention that the tax imposed by the act is not a property tax.

The only authorities cited in support of this proposition are the Kentucky cases, in which it is said that the tax is a license tax.

There is no consideration of the differences between a property tax and a license tax. No attention is paid to the numerous cases cited by us asserting that the Supreme Court, in considering constitutional questions involved in cases of this character, will determine for itself the nature and effect of the tax, irrespective of its description or classification by the State courts. Neither legislature nor court can, by calling it a license tax, convert into such license tax one which is directly imposed upon all oil produced, when first transported, irrespective of its ownership. The legislature in the 1918 act, in the emergency clause, frankly refers to it as a "tax on crude petroleum," and there is nothing in the body of the act from which it could be suspected that it was anything else.

II.

It is next contended for defendant in error that the Kentucky court properly construed it as a license tax imposed in addition to the *ad valorem* tax, because this was the only construction which could be given it so as to avoid conflict with provisions of the Kentucky Constitution, which do not permit the substitution of a license for the *ad valorem* tax required on all property. That such substitution of a license or production tax for the existing *ad valorem* tax was desired and intended by the legislature is not only clearly evident from the language of both acts of 1917 and 1918, but stands admitted in the pleadings in this case.

The cases cited in support of the contention are to the effect that where a statute is reasonably susceptible of two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution; but they do not justify the distortion of language, which is plain and clear, to mean something entirely different from its ordinary meaning; nor will such necessity to conform to constitutional requirement authorize the court to practically amend the legislative act.

The subject was recently considered by the court in the case of Yu Cong Eng *v.* Trinidad, 46 S. C., 619 (decided June 7, 1926), in which it was said (page 623):

> "(2) The main objection to the construction given to the act by the court below is that in making the act indefinitely mandatory instead of broadly prohibitory it creates a restriction upon its operation to make it valid that is not in any way suggested by its language. In several cases this Court has pointed out that such strained construction, in order to make a law conform to a constitutional limitation, cannot be sustained."

III.

It is next contended that the Supreme Court will usually accept the construction of a State statute given it by the highest court of that State.

This is true as to the mere construction of statutes, but, as said in St. Louis, L. & S. W. R. Co. *v.* Arkansas, 235 U. S., 350, 362:

> "But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State court."
>
> "We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

Another instance where the decision of the State court will not be regarded as controlling is where, as in this case, rights have accrued before a decision of the State court on the question involved.

Kuhn *v.* Fairmont Coal Co., 215 U. S., 349.

The *dicta* in the Raydure and Associated Producers Company cases to the effect that the tax on oil was a license tax, under the compulsion of making it conform to the State Constitution, will not be controlling on this Court, as describing the nature and effect of the tax; nor will this Court regard as either controlling or persuasive the decision of the State court in this case, rendered after the rights of the plaintiff in error accrued, holding the tax valid; not so much upon a consideration of the merits, but because it was in accord with the *dicta* in previous cases, and because, as the court said, without any foundation in the record, the State's finances and business of oil producers had been adjusted thereto.

If such State decisions were controlling on this Court in cases involving rights under the Federal Constitution, it can be readily imagined that this Court would become inferior in power to the State courts.

See

Hanover Fire Ins. Co. *v.* Carr, 47 S. C., 179, 183, decided Nov. 23, 1926.

IV.

It is also contended that this Court has upheld similar license-tax laws in Kentucky and other States, but it is readily seen from an examination of the cases cited that the laws upheld were not at all similar to the law here in question.

In Brown Forman Co. *v.* Kentucy, 217 U. S., 563, the act was found to have the incidents and effect of a license tax, the payment of which was a condition precedent to a continuance of the business. Here are none of the ordinary incidents of a license, but a direct imposition upon property.

So in Clark *v.* Titusville, 184 U. S., 329, there was no question as to the nature of the tax.

In Oliver Iron Co. *v.* Lord, 262 U. S., 172, the court had no difficulty in finding the tax in question an occupation tax, both from what the act called it and from its incidents and effect.

Counsel do not refer to the so-called whiskey-license tax, almost identical in its nature to the law here involved, which was held in Dawson *v.* Ky. Distillery & Warehouse Co., 255 U. S., 288, nor to other similar

cases heretofore cited by us in which such laws were held void.

V.

It is contended that the act does not violate the Fourteenth Amendment.

The State only contends that if the tax may be sustained as a license or occupation tax, it does not violate the Constitution in respect of denying the equal protection of the laws.

Our contention, however, is that, in its essence as well as according to the terms of the act, the tax is a direct imposition on property and not a license tax on any occupation; and it is not contended on behalf of the State that, if this is the case, the tax can be sustained under either the State or Federal Constitution.

It must, therefore, be admitted that if it is a property tax, it violates the State Constitution, which requires uniformity, forbidding double taxation on property; and for the State court to enforce it against oil producers is to deny them the equal protection of the State Constitution and laws.

See

Hanover Fire Ins. Co. *v.* Carr, 47 S. C., 179, decided November 23, 1926.

It is also contended that the Act of 1918 does not violate the Fourteenth Amendment by failure to afford due process of law to the owner of the oil whose property is taken under it. No comment is made by the

learned Attorney General on the cases in this Court cited by us on the proposition, nor on the rule that due process of law requires that, after appropriate notice, the taxpayer must be afforded an opportunity to be heard as to the validity and amount of the tax, by giving him the right to appear for that purpose at some stage of the proceedings. The cases cited by him do not conflict with the rule.

Citizens' National Bank of Kentucky, 217 U. S., 443, involved the taxation of a national bank by assessing its shares of stock and is not apposite.

In Merchants' Bank *v.* Pennsylvania, 167 U. S., 461, the portion of the opinion quoted shows that an opportunity was afforded to any stockholder who might desire to be heard.

In Bells Gap R. R. Co. *v.* Pennsylvania, 134 U. S., 232, the valuation of the property to be assessed, bonds, was fixed by law at face value, which the court held obviated the necessity for a hearing.

People's National Bank *v.* Marye, auditor, 107 Fed., 570, was another case of assessment of shares of a national bank.

We suggest that notice to the transporter of oil of the assessment of the tax is not appropriate notice to the owner; that, by reason of diversity of interest, the transporter should not and cannot be made by law the agent of the owner, so that notice to the transporter will satisfy the requirements of due process. Moreover, no opportunity for hearing is afforded the owner, even if the matter of notice should be overlooked.

It is submitted that this objection may not be brushed aside by saying that this petitioner has not been prejudiced by such invalidity in the law, because its pleading shows that the exact amount of the tax provided by the act was imposed upon it. The fact that any tax whatever is exacted under a void and unconstitutional law is sufficient prejudice to the taxpayer to entitle him to relief.

VI.

In argument that the Act of 1918 does not violate the commerce clause of the Constitution, notwithstanding the fact that it imposes the tax only when and after the oil has been started upon an interstate transportation, it is contended on behalf of the State that such imposition is merely the measure of a perfectly legitimate license tax for the local occupation of producing the oil, and is not a tax on the transportation itself. It is, however, a direct and forbidden burden upon such commerce. Such a bad measure of a tax that might be otherwise measured renders the act void.

The vice of the act in this respect is not that it imposes a license tax, but that it burdens and interferes with interstate commerce.

Anderson *v.* Shipowners' Assn., 47 S. C., 125, 126 (decided November 22, 1926).

See

Alpha Portland Cement Co. *v.* Mass., 268 U. S., 203.

The cases of Oliver Iron Co. *v.* Lord, and American Mfg. Co. *v.* St. Louis, cited by counsel, are not apposite, because in the former the measure of the tax was the value of the ore before it entered into interstate commerce, and in the latter the measure was the sales value of goods irrespective of the place of sale, the court finding there was no burden on interstate commerce.

VII.

It is finally contended on behalf of the State that, if the Act of 1918 should be held to be void upon any or all of the grounds alleged, it would leave the 1917 Act in effect, and, "unless the original Act of 1917 is found to be likewise objectionable," the tax in the same amount would be due thereunder, so the plaintiff in error would not be entitled to recover it. The Court of Appeals of Kentucky, in its decision in this case, has held that, if the 1918 Act is void, precisely the same tax would have been due under the 1917 Act, thus in effect holding that the 1917 Act is valid, and it denied relief, saying in effect to the taxpayer—

> "Yes, the 1918 Act is void, but the 1917 Act is left in effect. No assessment was ever made under the 1917 Act, or notice thereof given, which under the terms of the act must be done before any taxes are due. Although your money has been extorted by the State in an unauthorized manner, still it is no more than you would have been required to pay, if the authorized forms of law had been followed, and you are not

> permitted to recover it, though we have no intention of proceeding to assess and collect according to the 1917 Act."
>
> "Again, although the 1917 Act says that the tax is imposed in lieu of all other taxes on the wells producing said oil imposed by law, and the only other taxes then imposed by law were *ad valorem* taxes on said wells and rights to produce the oil, we now hold that, because the said tax could not constitutionally be imposed as a substitute for such other taxes, it was imposed in addition to such other taxes, contrary to the will and design of the legislature."

As a matter of general statutory construction, we might well question whether the invalidity of the 1918 Act in part, or as a whole, would leave the 1917 Act in full effect, but, assuming that the statement to this effect in the Kentucky courts' opinion would be accepted, let us see whether or not the Act of 1917 can be sustained.

The present case is the first one in which the Kentucky court has been called upon, or undertaken, to construe the Act of 1917, and, as before noted, its decision, made after the rights here involved accrued, is not binding on this Court. In view of the difference of language of the two acts, the 1917 Act containing the words "imposed by law" in designating the taxes in lieu of which the tax thereby provided was imposed, which words are not to be found in the 1918 Act, it is plain that it was intended to substitute the new tax for the *ad valorem* tax, which was the only one "im-

posed by law." This the legislature had no power to do under the State Constitution, as now clearly seen, and settled by the State decisions. For the State court to now say, since the rights have accrued, that the tax must be imposed in addition to, and not in lieu of the other taxes, is to deny to such taxpayers the equal protection of the laws forbidding double taxation on property. In this respect the 1917 Act is more clearly violative of the Fourteenth Amendment than is the 1918 Act.

Although it is admitted that the taxes here involved were imposed under the 1918 Act, and that the provisions of the 1917 Act as to assessment and notices were never complied with, the State seeks to justify such procedure and deny any relief, which is clearly a denial of the due process of law required by the Constitution.

It is sought to be made to appear from the language of section 162 of Kentucky statutes that the taxes are not recoverable if, in fact, any taxes are due the State "independent of the mistaken payment." It will be noted that the clause from which the above quotation is made refers only to the "tax due on any tract of land" and cannot be extended by inference to license taxes or taxes on personalty.

The taxes paid under the void 1918 Act are recoverable under section 162, whether or not the Act of 1917 remains valid. No taxes can be due under the 1917 Act until after assessment and notice.

It is respectfully submitted that the judgment denying plaintiff relief against the exaction of such tax should be reversed.

A. O. STANLEY,
E. L. McDONALD,
Attorneys for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1925

No. [redacted] 148

Swiss Oil Corporation, - - - Plaintiff-in-Error,

vs.

Wm. H. Shanks, Auditor of Public Accounts for the Commonwealth of Kentucky, - - - - - Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR

In error to the Court of Appeals of Kentucky.

FRANK E. DAUGHERTY,
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Attorneys for Defendant-in-Error.

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Supreme Court of the United States

OCTOBER TERM 1925

No. 556

SWISS OIL CORPORATION - - *Plaintiff-in-Error*

vs.

WM. H. SHANKS, Auditor of Public Accounts for the Commonwealth of Kentucky, *Defendant-in-Error*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT-IN-ERROR

It is contended by defendant-in-error that the Act of 1917 (R. 9, 11) as amended by the Act of 1918 (R. 11, 14) does not violate any provisions of the Federal Constitution, but even in the event it is determined that it does, plaintiff-in-error is not entitled to the relief sought in its petition unless the original Act (1917) is likewise obnoxious to said instrument.

While we might concede that on its face some provisions of the amended Act approach near the dividing line where the recognized exclusive powers of the State end and the like powers of the Federal Government begin, we can not recognize any color of merit in a contention

that the original Act in any respect contravenes the Constitution of the United States or that it even approaches near the established limits of the State's powers in respect to matters of taxation.

We feel justified in assuming that this court, following its long established rule, will adopt the construction of said Acts by the highest court of the State insofar as any alleged conflict with the Constitution or laws of the State is involved. The Court of Appeals of Kentucky has already determined that the Act complained of does not violate any provision of the Constitution of the State and therefore this court is only called upon to determine whether it violates any provision of the Federal Constitution.

I.

TAX IMPOSED BY THE ACT NOT A PROPERTY TAX

The Act of 1917 was first attacked in the State courts in the case of Raydure v. Board of Supervisors of Estill County, reported in 183 Ky. 84. A reading of the opinion in that case discloses that W. S. Raydure, who owned a number of leases in Estill County, Kentucky, was resisting the assessment of said leases for taxation. The assessment was made by the Board of Supervisors, the leases not having been listed by the owner. Raydure appealed from the action of the Board to the Quarterly Court of the county and from that court to the Circuit Court, and finally to the Court of Appeals.

The Court of Appeals, after disposing of the question as to the correctness of the procedure in making the assessment, and determining in favor of the State the contention made that oil leases were not property and therefore not subject to ad valorem taxation, passed to a consideration of the questions pertinent to the issues in this litigation. Answering first the contention made

that even if the leases in question had a cash value and could be sold for cash at a voluntary sale they should not be assessed for ad valorem taxation for the reason that the tax imposed by the Act of 1917, which was found in Section 4223c, Kentucky Statutes, was intended to and did include the value of the leases on the land from which oil was produced, the Court held that the tax imposed by the Act was not in lieu of the ad valorem tax to which the oil leases covering the producing territory was subject. The court pointed out that under Section 171 of the Constitution, as originally adopted, the legislature could not substitute a license tax for the ad valorem or property tax and that this prohibition was continued by the amendment of said section permitting the legislature to "divide property into classes and to determine what class or classes of property shall be subject to local taxation."

The court among other things said (page 95):

> "But it is further insisted that the oil leases here in question should not be assessed even if they have a cash value and could be sold for cash at a fair voluntary sale because, as said, the oil production tax provided for in section 1 of an act of 1917 that may be found in section 4223c of volume 3, Kentucky Statutes, was intended to and does include the value of the lease on the property from which the oil is produced. . . . . "

(Pages 96-97):

> "It would also necessarily follow if the position of counsel is well taken that the production tax would be substituted for and take the place of the ad valorem or property tax that we have held the oil leases subject to.
>
> In considering this contention the first question that naturally suggests itself is—Was it the purpose of the legislature in the enactment of this production tax statute, that the tax imposed should be in lieu of the ad valorem or property tax to which the oil lease covering the producing territory was subject, and

if such was the intention of the legislature, did it under the Constitution have the power to provide that a production tax might be in lieu of a property tax to which the property would be subject except for the production tax?

Previous to the amendment of section 171 of the Constitution by the amendment that was adopted in November, 1915, section 171 provided in part that 'taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law.' Under this original section it was held, in Levi v. City of Louisville, 97 Ky. 394, that the legislature had no power to substitute a license tax or any other kind of a tax in lieu of the uniform ad valorem property tax or to classify property for taxation. . . . "

(Pages 97-98):

"It was held, as we have seen in the Levi case, that the legislature was prohibited by section 171 of the Constitution from substituting a license tax for an ad valorem tax, and this prohibition was continued by the amendment to section 171. It is no more allowable under the amendment to substitute a license tax for an ad valorem tax than it was before the amendment. The only character of taxes that can be imposed under section 171, either before or since the amendment, is ad valorem or property taxes. If, by authority of the amendment, property is classified, as it may be for taxation, the tax that is imposed on the class under this section must be an ad valorem or a property tax. Neither the rule of uniformity nor the nature of the tax was changed in any manner by the amendment. The only change was the authority to classify, but when the classification is made the tax imposed must be an ad valorem or property tax and must be a uniform tax.

The tax provided for in this legislation was a license tax on the business and not a property tax. This is made plain by the title of the act of 1917, which reads: 'An act imposing a license or franchise

on any person, firm, corporation or association engaged in the production of oil in this state and authorizing counties also to impose such tax . . . ; providing methods of determining the amount of tax due . . . ;' and by the title of the act of 1918, which is an amendment of the act of 1917, and recites that it is 'An act to amend and reenact . . . the act . . . of 1917, which act imposes a license or franchise on any person, firm, corporation or association engaged in the production of crude petroleum in this state.' Thus showing very plainly the nature and purpose of the act. . . . . "

(Page 99):

"As we have endeavored to show, the legislature of 1917 did not and could not if it had so desired enact that the oil production tax should be in lieu of or as a substitute for an ad valorem tax on any species of property. The act itself is not susceptible of this construction, but if it were, and could not be interpreted to have any other meaning, it would necessarily be in conflict with section 171 of the Constitution and therefore void.

The validity of this statute, however, and the tax imposed by it may be upheld under section 181 of the Constitution as a license tax on the business of engaging in the production of oil. It cannot be sustained on any other ground. . . . "

(Pages 101-102):

"There being no contention that this act is either discriminatory or unreasonable there is no room to doubt that the imposition of this tax as a license tax on the privilege of producing oil was authorized by section 181 of the Constitution; nor is there any authority to be found holding that it is not competent for the legislature to impose a license tax for the privilege of doing business in addition to the ad valorem tax that may be imposed upon the property engaged in the business . . .

> It follows from what has been said that the production tax on the oil produced is separate and distinct from the ad valorem tax to which the leases are subject and cannot operate to exempt them from the property tax."

In the case of Craig, Auditor v. Security Producing and Refining Company, 189 Ky. 565, 566, 567, the Court of Appeals again recognized the tax imposed by the Act in question (Section 4223c Ky. Stats.) as a license tax. It appears from the opinion in that case that the Refining Company had paid a capital stock license tax for the years 1918 and 1919 under Sections 4189a and 4189c, Kentucky Statutes, as well as the tax equal to one per centum of the market value of crude petroleum produced by it. The producing company was seeking to recover from the State Treasury in an action brought pursuant to section 162 of Kentucky Statutes the capital stock license tax paid for said years on the idea that it had paid two license taxes for said years. The court among other things said:

> "It is conceded that the Security Producing & Refining Company paid, through mistake of law, the taxes for 1918 and 1919 under sections 4189a and 4189c, when it was required to and did pay to the state a licence tax equal to one per centum of the market value of the crude petroleum produced by it. It thus paid two license taxes when it was liable for only one. When it became liable for the license tax under section 4223c on its oil production, it was by the provisions of section 4189a relieved of liability for a license tax upon its capital stock, but it paid both these taxes and now seeks to recover the sum paid as the latter."

The Court of Appeals affirmed the judgment of the lower court, granting to the Refining Company the relief prayed for. The court was necessarily considering the Act of 1917 (Sec. 4223c, Ky. Stat.) as amended by Act of

1918 which became effective on March 29, 1918, when it rendered this opinion.

In the case of Associated Producers Co. v. Board of Supervisors of Estill County, 202 Ky. 538, 540, 541, 542, it appears that the Producers Co. had listed in 1921 its leases for taxation for 1922, but had omitted the producing wells from its list. The company admitted that it omitted to list its wells and also admitted that the value fixed by the assessing authorities would be reasonable if the wells were included. The Court of Appeals in disposing of the contention that the tax imposed by Section 4223c-1, Kentucky Statutes, was in lieu of all other taxation on leases said:

> "It is the contention of the oil company that when section 4223c-1 Kentucky Statutes was enacted the legislative intention, desire and expectation was that the license tax therein provided should be in lieu of all taxation on oil leases. It cannot be presumed that the General Assembly intended to pass an unconstitutional act or one which contravenes our fundamental law. If it intended to exempt the wells from an *ad valorem* tax its wish ran counter to our Constitution, and while the desire might have been to exempt the leases from *ad valorem* taxation, the act itself did not so provide, but on the contrary provided that the production tax should be in lieu of all other taxes 'on the wells producing crude petroleum.' In other words, there should be no other license tax as we construe this language."

The opinion then calls attention to the fact that Raydure v. Board of Supervisors, *supra,* was relied on by the Producers Company as authority for exempting oil wells from the valuation of leases for purposes of taxation, and the court quotes that part of the Raydure opinion which would indicate that the value of the leases should be fixed "excluding the value of each producing well thereon," and calls attention to the fact that the com-

pany overlooked a more important point discussed in the Raydure opinion, quoting from that part of the opinion which held in substance that the tax imposed by the Act complained of was separate and distinct from the ad valorem tax to which the leases were subject and could not exempt them from property tax, and that the court was not called upon to determine whether the Board of Supervisors had authority to make an exemption of five acres or any number of acres as Raydure was not complaining of the action of the board in exempting five acres around each well. Continuing at pages 541 and 542 the court said:

> "It is clear from the statutes, section 4223c-1, no less than from the opinion in the Raydure case, supra, that the tax intended to be imposed was merely a production or license tax. It could be nothing more. Under our Constitution, sections 171 and 172, all property of value must be assessed for ad valorem taxation, and as a well with or without its equipment is such property it is subject to an ad valorem tax. If the wells, separate from the lease, have value they must be subjected to an ad valorem tax. The section of the statute to which we have reference relates merely to a production or excise tax; so we held in the Raydure case, supra. That part of the opinion in the Raydure case which relates to the amount of acreage that should or could be laid off around a well as exempt is mere query or suggestion, not amounting even to dictum, for we expressly withheld opinion upon the question. That part of the opinion is now withdrawn as inapt."

In the case at bar the Court of Appeals of Kentucky in an opinion written by Judge Clarke (R. 28-33), reported in 208 Ky. 64, sets at rest any doubt as to the nature of the tax imposed by the Act complained of, holding the tax to be upon the business of producing oil in this State and that the Act does not conflict with the

State Constitution. We do not deem it necessary to here quote from the opinion as it is in the record and speaks for itself.

II.

ACT PROPERLY CONSTRUED BY COURT OF APPEALS OF KENTUCKY

The Court of Appeals of Kentucky in construing the statute in question as imposing a license or occupation tax upon the business of producing crude petroleum and that said tax was not in lieu of ad valorem or property taxes on the oil leases followed the universally adopted and well recognized rules of statutory construction.

In construing statutes courts will presume that the legislative body enacting same knew and intended to act within the scope of its authority, and that such body had full knowledge of the provisions of the Constitution with reference to the law enacted.

The presumption must then follow that in enacting this legislation the General Assembly of Kentucky acted in the full knowledge of the constitutional limitation against exempting property from ad valorem taxation or substituting in lieu thereof a license tax.

> "All statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law with reference to it. They are therefore to be construed as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the Constitution, but also in connection with other statutes on the same subject. . . . . Where two statutes are in apparent conflict they should be so construed, if reasonably possible, to allow both to stand and to give force and effect to each."
>
> 36 Cyc. 1146.

In the case of St. Louis & S. W. Ry. v. Arkansas, 235 U. S. 350, 369, the court laid down the following rule of construction:

> "No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the Legislature intended to act within the scope of its authority."

In Cooley's Constitutional Limitation, 7th Ed. at page 255, we find the rule laid down as follows:

> "The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such construction of the Statute as might not at first view seem most obvious and natural. For as a conflict between the Statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the Court, if possible, must give the Statute such a construction as will enable it to have effect. This is only saying, in another form of words, that the Court must construe the Statute in accordance with the legislative intent; since it is always to be presumed that the legislature designed the Statute to take effect and not to be a nullity.
>
> The rule upon this subject is thus stated by the Supreme Court of Illinois; 'Whenever an act of the legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts.' "

And continuing on page 256 the same author says:

"The Supreme Court of New Hampshire, a similar question being involved, recognized their obligation 'so to construe every act of the legislature as to make it consistent, if possible, with the provisions of the Constitution,' proceeded to the examination of a Statute by the same rule, without stopping to inquire what construction might be warranted by the natural import of the language used."

In Lewis' Sutherland on Statutory Construction, 2nd Ed., Section 83, page 135, we find the following:

"Another universal principle applied in considering constitutional questions is, that an act will be so construed, if possible, to avoid conflict with the Constitution, although such a construction may not be the most obvious or natural one. 'The courts may resort to an implication to sustain a statute, but not to destroy it.' "

In Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 546, we find the following:

" . . . It is a general and fundamental rule that if a Statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of its constitutional authority."

To the same effect as the Plymouth Coal Co. case see:

United States v. Delaware & Hudson Co., 213 U. S. 366.

Knights Templars' Indemnity Co. v. Jarman, 187 U. S. 197.

III.

THE SUPREME COURT OF THE UNITED STATES WILL ACCEPT THE CONSTRUCTION OF A STATE STATUTE BY THE STATE COURT.

The construction of a State Statute by the highest court of the State is usually accepted by the Supreme Court of the United States. The Court of Appeals of Kentucky has definitely determined that the tax imposed by the Statute under consideration is a license or occupation tax on the business of producing crude oil, and imposes in addition to and not in lieu of the ad valorem tax on leases, and this court will be inclined to adopt such construction.

In the case of Dawson, Attorney General of Kentucky v. Ky. Dist. & Warehouse Co., 255 U. S. 288, 292, the court said:

> "The question is one of local law, so that a decision by the highest court of the State would be accepted by us as conclusive."

In the case just quoted from this court had under consideration a statute of Kentucky imposing a tax upon the business of "owning and storing" distilled spirits in bonded warehouses, it being contended by the plaintiffs in bills filed in the district courts that the statute was void under both State and Federal Constitutions. The validity of the statute had not been passed upon by the state court. The court in its opinion stated that the tax in question had none of the incidents of an occupation tax and held it was a property tax, but indicated that a decision of the question by the state court would have been conclusive.

In this connection we would call attention to the fact that the court in its opinion stated that section 181 of

the state Constitution authorizes license or occupation taxes and that statutes imposing such taxes, measured by the amount of product, have been repeatedly sustained by the highest court of the state, citing Raydure v. Board of Supervisors, *supra*, and Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 604.

Again in the case of Brown-Foreman Co. v. Kentucky, 217 U. S. 563, 569, 572, the Supreme Court in disposing of contentions made that a statute of the State of Kentucky imposing a tax upon the business or occupation of compounding, rectifying, etc., distilled spirits was repugnant to the Constitution of Kentucky and the Federal Constitution said:

> "The questions concerning the validity of the Act under the State Constitution and as to the liability of the plaintiff-in-error under the Act as construed and enforced by the highest court of Kentucky, may be laid on one side, for the only contentions which concern us under this writ of error to the State Court are those which arise under the Constitution of the United States . . .
>
> Such a construction and interpretation of the Statuate here involved by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business, plainly subject to the regulating power of the State."

In the case of Tullis v. Lake Erie & Western Railroad Co., 175 U. S. 348, 353, the court had this to say:

> "As remarked in Missouri, Kansas, &c., Railway v. McCann, 174 U. S. 580, 586, the contention calls on this court to disregard the interpretation given to a State Statute by the court of last resort of the State, and, by an adverse construction, to decide that the State law is repugnant to the Constitution of the United States. 'But the elementary rule is

that this court accepts the interpretation of a statute of a State affixed to it by the court of last resort thereof.' "

And in the case of Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 42, 43, the court said:

> "The courts of Texas have like power of interpretation of the Statutes of Texas. What they say the Statuates of that State mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts."

IV.

THIS COURT HAS UPHELD SIMILAR LICENSE TAX LAWS IN KENTUCKY AND OTHER STATES.

In 1906 the General Assembly of Kentucky enacted a law imposing upon every person, firm or corporation engaging in the business or occupation of compounding, rectifying, adulterating or blending distilled spirits, a license tax of one-fourth of one cent upon each wine gallon of such compound. The law was attacked in the state courts, the plaintiff making practically the same contentions as to the invalidity of the law with respect to the State and Federal Constitutions as is made by plaintiff-in-error in this case. The Court of Appeals of Kentucky upheld the act as imposing a valid license or occupation tax and not a property tax, and in the case of Brown-Foreman Co. v. Kentucky, *supra*, this court affirmed the decision of the said court.

In the case of Clark v. Titusville, 184 U. S. 329, 334, the court, considering a city ordinance imposing a tax upon persons engaging in certain occupations, the tax on a business of a given class being regulated according

to the volume of business or minimum and maximum amounts of sales, held:

> "The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States."

By a statute enacted by the legislature of Minnesota a tax of six per cent of the value of all ore mined or produced in the state was imposed upon every person engaged in the business of mining or producing iron or other ores.

The Supreme Court of the United States in upholding this law in the case of Oliver Iron Co. v. Lord, et al., 262 U. S. 172, 176, 177, said:

> "The parties differ about the nature of the tax, the plaintiffs insisting it is a property tax and the defendants that it is an occupation tax. Both treat the question as affecting the solution of other contentions. There has been no ruling on the point by the Supreme Court of the State. We think the tax in its essence is what the Act calls it—an occupation tax. It is not laid on the land containing the ore, nor on the ore after the removal, but on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts. Mining is a well recognized business wherein capital and labor are extensively employed. This is particularly true in Minnesota. Obviously a tax laid on those who are engaged in that business, and laid on them solely because they are so engaged, as is the case here, is an occupation tax. It does not differ materially from a tax on those who engage in manufacturing."

The tax imposed by the act in controversy is not imposed upon the oil nor upon the transportation of the

oil. Neither is it upon the land from which the oil is removed, but is upon the business or occupation of producing crude oil and is simply regulated by the value of the oil produced. To so regulate a tax does not constitute it a property tax.

V.

THE ACT DOES NOT VIOLATE ANY PROVISION OF THE FOURTEENTH AMENDMENT

If, as we contend and have tried to show, the tax in question is upon the occupation or business of producing crude oil, no provision of the Fourteenth Amendment of the Federal Constitution is violated.

There is no want of uniformity or equality because the legislature selected one class or occupation as a subject for its taxing power, so long as the tax applies alike to all of the class under like circumstances and conditions.

The Fourteenth Amendment does not impose upon states iron rules of taxation intended to cripple and hamper them in their taxing power, and they may without contravening this amendment classify occupations, imposing a tax on a class or imposing different taxes on different classes and not imposing a tax on others. It only requires that all of a particular class be treated alike. Southwestern Oil Co. v. Texas, 217 U. S. 114.

In Oliver Iron Co. v. Lord, *supra,* the court in 262 U. S. at page 179, said:

> "The contentions made under the equal protection provisions of the 14th Amendment and under the State Constitution provision that 'taxes shall be uniform upon the same class of subjects' present a question of classification and have been argued together.
>
> Consistently with both provisions, the Legislature of the State may exercise a wide discretion in

> selecting the subjects of taxation, particularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class, and all members of the class are dealt with according to uniform rules."

Neither does it appear that the act deprives the taxpayer of his property without due process of law in that it does not provide for personal notice to him of the assessment by the Tax Commission.

The original act (R. 9-11) required each producer to make reports of crude oil produced by him and after receiving notice and having opportunity to be heard, to pay the taxes. It also required pipe line companies to make reports under sections 7 and 8 of the act (R. 10). Under the amended act (R. 11-14) a transporter is required to make the reports, and after notice and opportunity to be heard, to pay the tax for the producer.

This court has held in numerous instances that personal notice is not essential to due process of law in respect to taxation.

In the case of Citizens' National Bank v. Kentucky, 217 U. S. 443, 453, this court quoted with approval from an opinion in Commonwealth v. Citizens' National Bank, 117 Ky. 946, 957, wherein it was held:

> " . . . While neither the bank, nor its president, nor its cashier is the owner of the shares of stock, the bank is made by the act the agent of the shareholders, and the notice to it is notice to his agent, within the meaning of Section 4241. The president and cashier were properly made defendants because it is made their duty by the statute to list the stock. The bank is required to keep a list of its shareholders, and therefore knows who they are. Notice to the agent in an assessment of property is sufficient notice to his principal."

In the case of Merchants' Bank v. Pennsylvania, 167 U. S. 461, 466, 467, the court in considering a statute of Pennsylvania which made the bank its agent to collect a tax on the capital stock held by individuals, and in answering an objection, urged that there was lack of due process in that the shares were subjected to a tax without notice or hearing being afforded to the individual shareholders, said:

> "A final objection is that there is a lack of due process of law, in that the property of the shareholders is subjected to an ad valorem tax without an opportunity being given to them to be heard as to the value. It is true the statute contemplates no personal notice to the shareholders, but that has never been considered an essential to due process in respect to taxation. The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard."

Under the amended act the producer knows when his oil is removed from his tanks and the act gives him all the notice required as to the time for making reports, making assessments, hearing complaints and paying the taxes.

In the case of Bell's Gap R'd Co. v. Pennsylvania, 134 U. S. 232, 238, 239, it was urged that bondholders were deprived of their property without due process of law because the corporation was required to make the reports to the assessing authorities and to pay the tax.

The court said:

> "2. *As to want of notice to the owners of the bonds.* What notice could they have which the law does not give them? They know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed; and that they will only be required to pay this tax when, and as, they receive the interest. If

the State may assess the tax upon the face value of the bonds, notice *in pais* is not necessary. We think that there is nothing in this objection which shows any infraction of the Federal Constitution. It is urged that it is a taking of the bondholder's property without due process of law. We must confess that we cannot see it in this light. The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them. We see nothing in the process of taxation complained of, which is obnoxious to constitutional objection on this score. Stockholders in the national banks are taxed in this way, and the method has been sustained by the express decision of this court. *National Bank* v. *Commonwealth*, 9 Wall. 353

3. *That the corporation is taxed for property it does not own.* This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection."

In the case of People's National Bank of Lynchburg v. Marye, Auditor, 107 Federal Reporter, 570, the court had for consideration an act imposing a tax on the market value of the shares of stock in banks, the tax being assessed against the holders of the shares. The shares were assessed against the shareholders and the bank required to pay the tax, no personal notice being given to the

shareholders. The court in disposing of the question as to whether the taxpayer was deprived of his property without due process of law for want of notice, at page 580 said:

> "A careful inspection of the act shows that the assessor performs no judicial act in what he does; the fair interpretation being that the assessment made by him is upon the market value of the stock as reported to him by the bank, and the act itself fixes the amount of the tax; and, under this view, further notice to the taxpayer of the assessment is not required."

Under the act in question the assessing authority is required to make his assessment upon the market value of the oil produced and reported to him. The producer was notified by the act when assessment would be made and when hearing might be had.

The notice to the transporter as agent in addition to the notice given by the act itself appears to have afforded plaintiff-in-error all necessary protection, as the petition discloses no prejudice due to want of personal notice. It is alleged in its petition (R. 1-2) that it produced 421,125.53 barrels of crude oil or petroleum of the market value of $894,463.91, and that a tax of one per cent of the market value of same was assessed for state purposes and the tax paid by the transporter and collected from it, and further on in its petition it is shown that plaintiff-in-error was required to and did pay the sum of $8,944.64, which is one per cent of the market value of the oil as set out in its petition and which sum it now seeks to recover. The petition on its face shows that plaintiff in error only paid as a tax one percentum of the market value of the crude petroleum produced by it during the period in controversy, hence it was not prejudiced if in fact it did not receive personal notice of the assessments made by the Tax Commission.

VI.

THE ACT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION

We now come to the most serious objection made by plaintiffs-in-error to the act in question. The amendment of 1918 provides that the tax imposes when the crude oil is first transported from the tanks or other receptacles at the place of production.

In construing amendments where there is doubt as to the meaning of an act, a court may look to the original act if necessary to ascertain the purpose and meaning of the amendment.

It clearly appears that the legislature did not intend by the amendment to change the nature of the tax, the sole and only purpose being to overcome and to avoid the difficulty in the administration of the original act (R. 14), and as said in Bell's Gap R'd Co. v. Pennsylvania, *supra,* "This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party."

The tax is not imposed in respect to the ownership of the crude oil nor to the transportation of same, but imposes in respect to the business of engaging in the production of crude oil in the state of Kentucky.

In the case of Oliver Iron Co. v. Lord, *supra,* the court at page 179 said:

> "The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such, commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

Producing crude oil is local business like manufacturing and is subject to local regulation, but the crude oil does not in any event enter interstate commerce until after it is brought to the surface. The act in question makes no discrimination against interstate commerce, and while it may indirectly and incidentally affect such commerce it is not in our opinion a direct burden or interference upon such commerce. If hurtful at all it is only remotely so.

The city of St. Louis, under authority granted by its charter, provided for a tax upon the right to manufacture goods within the city, the tax being computed upon the amount of the sales of the goods so manufactured.

In the case of American Manufacturing Co. v. City of St. Louis, 250 U. S. 459, 463, the court in upholding the tax among other things said:

> "The admitted facts show that the operation and effect of the taxing scheme now under consideration are correctly described in what we have quoted from the opinion of the State Court. No tax has been or is to be imposed upon any sales of goods by plaintiff-in-error except goods manufactured by it in St. Louis under a license tax conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the city of St. Louis."

The act under consideration as construed by the state court is a tax imposed upon the business of producing crude oil. "The settled construction of a state

statute by its Supreme Court is considered a part of the statute itself." Massingill v. Downs, 7 How. 760.

No tax is to be imposed except on oil produced in the State of Kentucky, and the tax is computed according to the market value of the oil produced whether sold within or without the state and whether in interstate or intrastate commerce.

The fact that the imposition and payment of the tax is postponed is not prejudicial or hurtful to the producer or transporter, and the amount of the tax is the same whether exacted at the time the crude petroleum is produced or is deferred until it is removed and sold.

Any suggestion that the producer might store his oil at the place of production and thereby evade the payment of the tax may be aptly met by the words of the court in the opinion of American Manufacturing Co. v. St. Louis, *supra*, when it was said:

> "It is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses."

VII.

PLAINTIFF-IN-ERROR NOT ENTITLED TO RELIEF SOUGHT EVEN THOUGH ACT OF 1918 SHOULD BE HELD UNCONSTITUTIONAL.

We contend that plaintiff-in-error is not entitled to the relief sought by its petition even though the court should determine and hold that the Act of 1918 is obnoxious to the Federal Constitution and therefore invalid, unless the original Act of 1917 is found to be likewise objectionable. The original Act, as construed by the highest court of the State, is not subject to any of the criticisms made to the amended Act. It does not violate

any provision of the Federal Constitution, therefore it will stand and remain in effect in the event the amendment is held void.

If the Act of 1918 is unconstitutional it is of no more force or effect than if it had never been enacted, and it did not and could not have the effect of amending or repealing the Act of 1917. This principle is well recognized by all State and Federal courts and by text writers. We shall content ourselves with quoting only a few of the many authorities on this point:

> "Where a statute which undertakes to amend and re-enact an existing statute is invalid, the existing statute remains in force."
>
> 36 Cyc. 1056.

> "An unconstitutional Act is not a law; is confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."
>
> Norton vs. Shelby County, 118 U. S. 425, 442.

> "The validity of a constitutional enactment such as the act of 1890 cannot be impaired or affected by an unconstitutional amendment. The amendment may be held invalid, but the act it amends, if free from constitutional objections, will stand as it did before the unconstitutional amendment. It cannot for a moment be entertained that an unconstitutional amendment to a valid act can destroy the validity of the act. The amendatory act is void from its inception, and may be entirely discarded as unaffecting the original act."
>
> Gay vs. Brent, 166 Ky. 833, 849, 850.

> "It is contended, however, that as the act of December 10, 1903, was null and void . . . .
>
> "Let this be conceded. The act of December 10, 1903, being void, the chapter which it undertook to

amend and re-enact remains in force as it stood prior to that date."

Whitlock vs. Hawkins, 105 Va. 242, 253.

"Where, however, it is not clear that the legislature, by a repealing clause attached to an unconstitutional act, intended to repeal the former statute upon the same subject except upon the supposition that the new act would take the place of the former one, the repealing clause falls with the act to which it is attached."

State ex rel, Law vs. Blend, 121 Ind. 514, 518, 519.

Judge Cooley in writing the opinion in the case of Campau v. City of Detroit, 14 Michigan, 276, 285, 286, had this to say:

"The Act of 1865 contained many other provisions, the validity of which is not disputed, so far as we are informed; and the last section repeals all acts and parts of acts inconsistent with its provisions. The plaintiff in error contends that, even if the sections which relate to a jury are invalid, the last section must still have the effect to repeal the original sections.

If the repealing clause had in express terms repealed certain acts and parts of acts by name, and the act had then gone further, and attempted to substitute unconstitutional provisions, the argument which has been made would be more plausible than it seems to us now. But the repealing clause here in question is distributive in its application to each section of the act, and neither in words nor in apparent design undertakes to repeal any acts or parts of acts, except those which would come in conflict with the provisions it attempts to substitute. The repeal was simply to displace all conflicting provisions, so that these could have full effect. But nothing can come in conflict with a nullity, and nothing is therefore repealed by this act on the ground solely of its being inconsistent with a section of this law which is entirely unconstitutional and void."

In the case of People, ex rel. Farrington v. Mensching, 187 N. Y. 8, 22, 23, Judge Vann said:

> "A section in a later act amending a section in an earlier act, 'so as to read as follows,' if followed by a blank space only, would effect no change in the law. That is the legal effect of the situation before us, so far as the question now involved is concerned. The section of 1906 is void, at least in the respect mentioned, and a void thing is no thing. It changes nothing and does nothing. It has no power to coerce or release. It has no effect whatever. In the eye of the law it is merely a blank, the same as if the types had not reached the paper. It neither repealed nor substituted, for as it is void it could no neither . .
>
> The new section never breathed. Instead of blotting out the earlier it was blotted out itself. Instead of amending 'so as to read as follows' it did not amend in any respect. Conceding that the two sections cannot stand together, still the earlier is the only one that ever stood at all."

Judge Clarke, writing the opinion of the Court of Appeals in the case at bar (R. 28, 33), 208 Ky. 64, 71, said:

> "The amendment is simply a re-enactment of the original act, with the latter's administrative features so changed as to make the collection of the tax both more certain and less burdensome upon the taxpayer and the assessing and collecting officials. If any or all of the above contentions are sound, the amendment would be destroyed, but this would leave the original act in force, and unamended."

Attorneys for plaintiff-in-error realizing the force of this argument would avoid it by asserting that the tax sought to be recovered was assessed and paid under the 1918 Act, and if the 1918 Act should be held invalid it would follow that the assessment and collection of the tax was invalid and plaintiff-in-error would therefore be

entitled to a refund of the taxes paid during the period in question. It may not be so lightly brushed aside. The tax is the same whether paid under the amended Act or under the original Act before it was amended. Any right to a refund of taxes paid into the Treasury of the State must be based on Section 162 of Kentucky Statutes which reads as follows:

> "When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

Under the foregoing section plaintiff-in-error is not entitled to a refund unless it shall be made to appear that it paid taxes into the treasury when no such taxes were in fact due.

Turning again to the allegations of the petition we find that plaintiff-in-error admits that during the two year period for which recovery is sought it produced 421,125.53 barrels of crude oil or petroleum in the State of Kentucky, and that the market value thereof was $894,463.91 (R. 1); that it paid into the State Treasury the sum of $8,944.64, being one per cent of the market value of the crude petroleum produced by it (R. 4). So under the allegations of the petition, plaintiff-in-error paid exactly one per cent of the market value of the crude petroleum produced by it in the State of Kentucky, and the amount would have been the same if the tax had been paid under the Act of 1917, therefore it must follow that

it has not paid into the State Treasury taxes which were not in fact due.

In closing would say we have given no thought to the question of the contemporaneous construction of the Act in question by oil men or by officials charged with the administration of the Act. Such construction clearly must give way to the settled construction of the Act by the highest courts of the State. We call attention to Judge Clarke's discussion of this question in the opinion of the Court of Appeals (R. 31, 32), as well as to the allegations of the petition that following the opinion of the Court of Appeals in Raydure v. Board of Supervisors, *supra,* plaintiff and all other such producers and owners of leases in the State have been required to list its wells, leases, rights and all material and equipment for taxation.

We respectfully ask that the judgment of the Court of Appeals of Kentucky be affirmed, but in the event the Act of 1918 should for any reason be held unconstitutional, we submit that the original Act should remain in effect and plaintiff-in-error should be denied the relief it is seeking.

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